

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA A. PAPPAS, Personal Representative
of the Estate of FLORINDA C. PAPPAS,
Deceased,

Plaintiff-Appellant,

v

BORTZ HEALTH CARE FACILITIES, INC., and
WARREN GERIATRIC VILLAGE, INC., d/b/a
BORTZ HEALTH CARE OF WARREN,

Defendants-Appellees.

UNPUBLISHED
March 3, 2005

No. 251144
Macomb Circuit Court
LC No. 2003-002446-NH

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Plaintiff Patricia Pappas appeals as of right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(7) based on the statute of limitations. We reverse and remand for further proceedings. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

This medical malpractice action is based on the quality of care that the decedent, Florinda Pappas, received while living at defendants' nursing home. Florinda Pappas suffered from acute dementia, depression, and decreased mobility, and she was taking medications that increased her risk of falling. On March 27, 1997, Florinda Pappas underwent surgery for a brain injury that she allegedly suffered after a series of falls. Florinda Pappas died on July 13, 2001.

On July 16, 2002, Patricia Pappas was appointed personal representative of Florinda Pappas's estate. Patricia Pappas filed this medical malpractice action on June 2, 2003, alleging that defendants' staff negligently failed to prevent Florinda Pappas from falling and injuring herself repeatedly while in their care between April 1, 1996, and March 27, 1997. The trial court determined that the applicable limitation period expired on March 27, 1999, and therefore granted defendants' motion for summary disposition based on the statute of limitations.

II. Standard Of Review

When reviewing a motion under MCR 2.116(C)(7), we accept the contents of the complaint as true unless contradicted by the parties' documentary evidence.¹ "Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo."²

III. The Statute Of Limitations And The Discovery Period

The statute of limitations for a malpractice action is generally two years.³ However, pursuant to MCL 600.5838a(2), "an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.*" The six-month discovery period is a distinct limitation period from the two-year period prescribed in MCL 600.5805(6).⁴

Consequently, we find merit to Patricia Pappas's claim that the trial court erred by failing to apply the discovery rule to Florinda Pappas. Although this Court indicated that the discovery rule can be applied to a personal representative's discovery of a potential claim,⁵ this Court did not preclude application of the discovery rule to a decedent. Indeed, the Michigan Supreme Court specifically applied the discovery rule to a decedent in *Miller v Mercy Memorial Hosp.*⁶ Although this case is distinguishable from *Miller* in that the decedent in *Miller* discovered a possible malpractice claim before his death, a decedent's discovery of a possible cause of action is not a prerequisite to applying MCL 600.5838a(2). As a matter of law, a wrongful death action brought by a personal representative belongs to the decedent.⁷ Hence, Patricia Pappas stood in the shoes of Florinda Pappas for purposes of determining whether Florinda Pappas discovered or should have discovered her malpractice claim before her death.

In the context of this case, the material question is whether Patricia Pappas's action was timely commenced under the savings statute, MCL 600.5852, which states:

¹ *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004).

² *Farm Bureau Mut v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003).

³ MCL 600.5805(6).

⁴ *Miller v Mercy Memorial Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002).

⁵ See *Poffenbarger v Kaplan*, 224 Mich App 1, 11-13; 568 NW2d 131 (1997), overruled in part by *Miller*, *supra* at 200-201 n 3.

⁶ See *Miller*, *supra*.

⁷ *Allstate Ins Co v Muszynski*, 253 Mich App 138, 142; 655 NW2d 260 (2002).

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

By its terms, MCL 600.5852 only operates within the context of the separate limitation periods that would otherwise bar an action.⁸ Thus, if Florinda Pappas did not discover or should not have discovered a possible malpractice claim before her death, then the six-month discovery period would not have run before her death. As such, Patricia Pappas, as personal representative of Florinda Pappas's estate, was entitled to bring an action within two years after her appointment as personal representative, but no later than three years after the period of limitations has run.

We are not persuaded by Patricia Pappas's argument that the undisputed facts warrant summary disposition in her favor with regard to the application of the discovery rule. Patricia Pappas's reliance on defendants' concession that the decedent was insane within the meaning of MCL 600.5851 is misplaced, because that statute defines "insane" as a "mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know."⁹ To the extent that Patricia Pappas argued below that MCL 600.5851 may itself be viewed as a statute of limitations, she has abandoned that argument on appeal because she has not pursued it. We note, however, that MCL 600.5851 does not itself support Patricia Pappas's position that her complaint was timely because this statute does not function to toll a general statute of limitations during the disability period. Rather, it "allows disabled plaintiffs additional, separate protections from the bar of the statute of limitations, protection that is independent of the running of the statute."¹⁰ Here, even if Florinda Pappas was insane within the meaning of MCL 600.5851, her death on July 13, 2001, removed that disability. Under MCL 600.5851, Patricia Pappas had one year after the disability was removed to file this malpractice action in a representative capacity. Because the complaint was not filed within this time period, the protection afforded by MCL 600.5851 is unavailable to Patricia Pappas.

However, application of the *discovery rule*¹¹ is not dependent on the person's subjective ability to comprehend rights, but rather is dependent on whether objective facts demonstrate awareness of an injury and its possible cause. The general test for applying the "should have discovered" standard under the discovery rule is whether, "on the basis of objective facts, the

⁸ *Waltz, supra* at 651.

⁹ MCL 600.5851(2).

¹⁰ *Hong v Liddy*, 199 Mich App 1, 4; 500 NW2d 745 (1993).

¹¹ MCL 600.5838a(2).

plaintiff should have known of a possible cause of action.”¹² “This occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician.”¹³ The objective standard is also applied in light of the plaintiff’s particular circumstances.¹⁴ Under MCL 600.5838a(2), the plaintiff must prove that he or she, “as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim.”

As applied to this case, Patricia Pappas stands in Florinda Pappas’s shoes for purposes of determining whether a claim was discovered or should have been discovered before Florinda Pappas’s death. Accepting as true the allegations in Patricia Pappas’s complaint about Florinda Pappas’s cognitive limitations, including her alleged acute dementia, neither party was entitled to summary disposition because a disputed factual question existed with regard to whether a reasonable person with Florinda Pappas’s condition would have become aware of her injury and its possible cause.¹⁵

Because the question whether, for purposes of MCL 600.5852, the six-month limitation period ran requires a resolution of this disputed factual issue, we are unable to conclude that either party was entitled to judgment as a matter of law. Hence, we reverse the trial court’s order of summary disposition and remand for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen

¹² *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997).

¹³ *Id.* at 232.

¹⁴ *Levinson v Trotsky*, 199 Mich App 110, 112-113; 500 NW2d 762 (1993).

¹⁵ *Cf. Levinson v Sklar*, 181 Mich App 693, 697-698; 449 NW2d 682 (1999).